



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA-R08-OAR-2020-0742; FRL-9082-02-R8]

Approval and Promulgation of the Northern Cheyenne Tribe's Tribal Implementation Plan; Northern Cheyenne Tribe; Open Burning Permit Program and Maintenance of the National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a Tribal Implementation Plan (TIP) submitted by the Northern Cheyenne Tribe (Tribe) on September 25, 2017, as described in our February 26, 2021 proposal. The TIP includes ambient air quality standards and provisions for an open burning permit program, enforcement and appeals, and emergency authority. These provisions establish a base TIP that is suitable for the Northern Cheyenne Indian Reservation and four tribal trust parcels at issue (Reservation), is within the Tribe's regulatory capacities, and meets all applicable minimum requirements of the Clean Air Act (CAA or Act) and EPA regulations. The effect of this action is to make the approved TIP federally enforceable under the CAA and to further protect air quality on the Reservation.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EPA has established a docket for this action under EPA-R08-OAR-2020-0742.

Generally, documents in the docket for this action are available electronically at

<https://www.regulations.gov> or in hard copy at EPA Region 8, 1595 Wynkoop Street, Denver, Colorado. While all documents in the docket are listed at <https://www.regulations.gov>, some

information may be publicly available only at the hard copy location (*e.g.*, copyrighted material, large maps, multi-volume reports) and some may not be available in either location (*e.g.*, confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Kyle Olson, Air and Radiation Division, Environmental Protection Agency, Region 8 Office, Mailcode 8ARD-TRM, 1595 Wynkoop Street, Denver, CO 80202-1129, telephone number: (303) 312-6002, email address: olson.kyle@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, the terms “we”, “us”, and “our” refer to EPA.

I. Summary of the Proposed Action

The Tribe’s Reservation is located in southeastern Montana and is adjacent to the Crow Indian Reservation and the State of Wyoming. On February 26, 2021, EPA proposed to approve a TIP submitted by the Tribe on September 27, 2017, as described in the proposal.¹ The TIP includes ambient air quality standards and provisions for an open burning permit program, enforcement and appeals, and emergency authority. The TIP is a regulatory program comprised of the Northern Cheyenne Clean Air Act (NCCAA). We proposed to approve the NCCAA under sections 110 and 301 of the CAA, and the relevant implementing regulations, as discussed in this document and in our February 26, 2021 proposal. These provisions establish a base TIP that is suitable for the Reservation, is within the Tribe’s regulatory capacities, and meets all applicable minimum requirements of the CAA, the Tribal Authority Rule in 40 CFR part 49 (TAR), and other applicable CAA regulations.

¹ 86 FR 11674 (Feb. 26, 2021).

For a more detailed description of the TIP, our evaluation of the TIP and supplemental information, and our rationale for our proposed action, please see the February 26, 2021 proposed rule, 86 FR 11674, which can be found in the docket for this action.

II. EPA's Response to Comments

Our February 26, 2021 proposed rule provided for a 30-day comment period, which ended on March 29, 2021. We received nine public comment letters, each of which can be found in the docket for this action. Seven comments expressed general support for our proposed action and did not otherwise raise material issues that necessitate response. Here, we summarize and respond to significant comments.

Commenter 0007: The commenter offered support for approval of the Northern Cheyenne TIP and support for implementation plans generally. In particular, the commenter described TIPs as positive for the tribes and an indication that enforcement of TIPs will be successful and thorough. The commenter also stated that exposure to dangerous air pollution is dwindling, which can be attributed, in no small part, to implementation plans. The commenter stated that regulating air pollution within the borders of the Reservation is an important step to making the country more proactive against climate change. The commenter further summarized other supportive comments.

Nevertheless, the commenter stated that the industrial and manufacturing power plants that surround the Reservation have a major impact on the air quality of the Reservation, which is unfair to those who live on the Reservation but are not part of these industries. The commenter also identified “drawbacks” of TIPs—that TIPs focus on higher levels of air pollution as opposed to other smaller problems, and that TIPs require a lengthy administrative process, which does not lead to fast action to reverse the effects of climate change.

Response: We appreciate the commenter's support for the approval of the Northern Cheyenne TIP and general support for the regulation of air pollution through TIPs. The administrative process for TIP approval is governed by CAA sections 110 and 301 and

corresponding regulations.² We explain elsewhere in this preamble that TIPs are not required to address each element under CAA section 110, but may instead include elements to address the specific air quality needs that a tribe has the capacity to manage. The commenter has not provided enough information regarding smaller air pollution problems that the commenter believes should be addressed in TIPs for us to respond further on that point.

Additionally, while we understand and appreciate the commenter's concerns with respect to climate change and agree that climate change is an important environmental problem, the purpose of this action is not to address the problem of climate change, but rather to approve the Tribe's plan to regulate certain air pollutants emitted by open burning.³ Thus, consideration of climate change is outside the scope of our action. Likewise, the commenter's concerns regarding sources located outside the Reservation are also outside the scope of the action. The TIP applies within the exterior boundaries of the Reservation only. The Tribe is not required to address pollution from outside the Reservation in its submittal and EPA's task is to evaluate the program elements the Tribe has submitted. The commenter's concern with the administrative process for developing TIPs is also outside the scope of this action. We note that the process of having tribes decide when and how to develop TIPs gives tribes the authority over how to best protect air quality in Indian country, and the Northern Cheyenne Tribe fully supports approval of the TIP here.

Commenter 0009: The commenter offered support for the primary and secondary air quality standards established in the TIP, which are the same as EPA's national ambient air quality standards (NAAQS). However, the commenter stated that the TIP did not include "any protocols the Northern Cheyenne Tribe plans to implement to reach attainment."⁴ The

² See, for example, 40 CFR part 51, appendix V, and 40 CFR part 49, subpart A.

³ 86 FR 11675.

⁴ Comment 0009 at page 1. The commenter cites CAA section 107, but that provision is not at issue in this rulemaking. As stated in the preamble to the proposed rule, EPA is taking this action pursuant to CAA sections 110(o), 110(k)(3), and 301(d). CAA section 110(o) requires that EPA review TIPs in accordance with CAA section 110 except as otherwise provided by regulation or CAA section 301(d)(2). Accordingly, we have reviewed the TIP under CAA section 110 as applicable to TIPs. See 40 CFR 49.9(h).

commenter further asserted that CAA section 110(a)(2) requires that TIPs include control measures, means or techniques, and a monitoring program by which the Tribe will attain the standards, and that the TIP lacks these mechanisms.

Response: As an initial matter, the TIP does include measures to improve air quality, including, significantly, an open burning permit program.⁵ However, the commenter is correct that the TIP does not include all elements listed in CAA section 110 for the implementation, maintenance, and enforcement of the air quality standards. Under the TAR, eligible Indian tribes have the flexibility to include in a TIP only those implementation plan elements that address their specific air quality needs and that they have the capacity to manage. Under this modular approach, the TIP elements that the tribe adopts must be “reasonably severable” from the package of elements that can be included in a whole TIP.⁶ As provided in the TAR, “reasonably severable” means that the parts or elements selected for the TIP are not integrally related to parts not included in the TIP, and are consistent with applicable CAA and regulatory requirements.⁷ Thus, TIPs are significantly different than state implementation plans because, while the Act requires states to prepare an implementation plan that meets all of the requirements of CAA section 110, an Indian tribe may adopt TIP provisions that address only some elements of CAA section 110.⁸

EPA retains its general authority to directly implement CAA requirements in Indian country as necessary or appropriate to protect tribal air resources.⁹ Thus, where a tribe chooses not to adopt a CAA program or adopts only a partial program, EPA may exercise its authority to issue such regulations as are necessary or appropriate to protect tribal air resources. This type of

⁵ In addition, contrary to the commenter’s assumption about the lack of a monitoring program, the Tribe has, for decades, operated an air quality monitoring program. Northern Cheyenne Tribe’s Application for Treatment as a State Under the Clean Air Act (Northern Cheyenne TAS/TIP Application), September 20, 2017, at 6-7.

⁶ 40 CFR 49.7(c).

⁷ Id.

⁸ Id. See also 42 U.S.C. 7410(o) (providing that EPA reviews TIPs in accordance with CAA section 110, except as provided by regulations under CAA section 301(d)(2), including 40 CFR 49.7(c)).

⁹ See 42 U.S.C. 7601(a), (d)(4); 40 CFR 49.11; 59 FR 43956, 43958-61 (August 25, 1994) (proposed TAR preamble explaining EPA’s CAA authorities in Indian country); 63 FR 7254, 7262-64 (Feb. 12, 1998) (final TAR preamble).

joint management allows tribes to focus on their specific air quality needs while ensuring adequate protection of tribal air resources.

At this time, the Northern Cheyenne Tribe opted to include in its TIP certain limited measures—an open burning permit program and related enforcement authority. This program and enforcement authority are severable from other CAA program elements because they do not depend on the inclusion of and are not integrally related to any other program elements. Additionally, as discussed further below, EPA has reviewed the open burning permit program and concluded that it supports the implementation, maintenance, and enforcement of the air quality standards. The open burning program is designed, in part, to control particulate matter emissions. Moreover, EPA has reviewed the enforcement authority included in the TIP and determined that it is sufficient to ensure enforcement of the NCCAA. Likewise, through the Tribe’s treatment in a similar manner as a state (TAS) application, the Tribe has demonstrated that it is capable of implementing the open burning permit program and enforcement authorities.¹⁰

Commenter 0009: The commenter also criticized the TIP’s open burning program as inefficient and unduly burdensome. In particular, the commenter raised concerns that requiring a permittee to apply for a permit with the Tribe’s Air Quality Administrator and wait for consultation with the Bureau of Indian Affairs and other agency personnel is inefficient. The commenter also stated that the burden placed on the Air Quality Administrator and Northern Cheyenne Tribal Court for “minute violations” is impractical and unnecessary. The commenter also stated that the size of the penalty for violations is too hefty, claiming that violations of the open burning program would subject individuals “to at least a five thousand dollar fine.” Furthermore, the commenter stated that there is no basis in the proposed rule for the finding that there is no information collection burden under the Paperwork Reduction Act. Finally, the

¹⁰ Letter dated June 22, 2020, from Gregory Sopkin, Region 8 Regional Administrator, to President Rynalea Whiteman Pena, Northern Cheyenne Tribe, Subject: “Approval of Northern Cheyenne Tribe Application for Treatment in a Similar Manner under the Clean Air Act,” at 8-9.

commenter stated that the TIP lacks any statistics proving that the open burning that is the subject of the permitting program is any different from other burning not covered by the program. The commenter recommended that the Northern Cheyenne Tribe reconsider the open burn limits and exceptions, and initiate a simpler reporting and filing program, such as on-site permitting or virtual permitting.

Response: Under the TIP process, tribes decide how to structure permitting and enforcement programs submitted for approval in a TIP. This gives tribes the flexibility to balance the protection of tribal air quality and the administrative process involved in doing so. EPA supports tribal decisions on how best to protect tribal air quality, and the CAA does not condition a TIP's approval on its administrative efficiency or require that a tribe justify open burning limitations with statistics. EPA supports tribes implementing open burning permit programs to support air quality on reservations.¹¹

Here, the Tribe considered the level of administrative process to include in the TIP. EPA disagrees that the Northern Cheyenne Tribe's process is inefficient or will be problematic in practice. The Tribe indicates that it is already successfully implementing this process under tribal law,¹² and the program is similar to open burning programs that other tribes administer as part of approved TIPs and Federal Implementation Plans.¹³ Concerning the commenter's assertion that violations of the open burning program would lead to excessive penalties, it is not accurate that a violator will be subject to *at least* a five thousand dollar fine. The NCCAA authorizes the Air Quality Administrator to fine violators "*up to* \$5,000 per day for each violation[.]"¹⁴ and the Air Quality Administrator has the enforcement discretion to assess penalties below that maximum.

¹¹ See, e.g., 76 FR 69618 (December 10, 2007) (EPA approval of the St. Regis Mohawk Tribe's TIP); 79 FR 69763 (November 24, 2014) (EPA approval of the Swinomish Indian Tribal Community's TIP); EPA, "Developing a Tribal Implementation Plan," September 2018, pages 26-27, available at https://www.epa.gov/sites/default/files/2018-09/documents/developing_a_tribal_implementation_plan_sept._2018_1.pdf

¹² Northern Cheyenne TAS/TIP Application at 7.

¹³ Precedent for tribes to use minor source permitting programs to protect air quality includes the Gila River Open Burning Minor New Source Review Permit Program (75 FR 48880 (August 12, 2010) and the Nez Perce's Agricultural Open Burning Permit Program (70 FR 18074 (April 8, 2005)).

¹⁴ NCCAA section 3.2(1) (emphasis added).

EPA does not agree that this TIP should be disapproved because of concerns about the level of possible fines for violations.

EPA disagrees with the commenter's assertion that EPA's approval of the TIP will result in a "burden placed on the collection of information under the Paperwork Reduction Act."¹⁵

Broadly, the Paperwork Reduction Act provides for certain procedures relating to the "collection of information" by or for an agency, generally limited to identical questions posed to or identical reporting or recordkeeping requirements imposed on ten or more persons.¹⁶ The information-related requirements of the NCCAA already exist as a matter of tribal law. EPA is not using identical questions to collect information from or imposing identical reporting or recordkeeping requirements on 10 or more persons as part of this action. This action does not impose information collection burdens prohibited by or contrary to the Paperwork Reduction Act.

III. Final Action

Under CAA sections 110(o), 110(k)(3) and 301(d), and the TAR, EPA is approving the TIP submitted by the Tribe on September 25, 2017, as described in our February 26, 2021 proposal (86 FR 11674). For the reasons set forth in this document and in the February 26, 2021 proposed rule, we conclude that the TIP meets the applicable requirements of the CAA and EPA's implementing regulations.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference the TIP amendments described in section III of this preamble. The EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more

¹⁵ Comment 0009 at page 3.

¹⁶ See 44 U.S.C. 3502(3)(A).

information). Therefore, these materials have been approved by the EPA for inclusion in the TIP, have been incorporated by reference by the EPA into that plan, and are fully federally enforceable under section 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval.

V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a “significant regulatory action” and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001). This action approves laws of an eligible Indian tribe as meeting Federal requirements and imposes no additional requirements beyond those imposed by Tribal law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Because this rule approves pre-existing requirements under Tribal law and does not impose any additional enforceable duty beyond that required by Tribal law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (59 FR 22951, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” EPA has concluded that this rule will have tribal implications in that it will have substantial direct effects on the Tribe. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. EPA is approving the Tribe’s TIP at the request of the Tribe. Tribal law will not be preempted as the Tribe has already incorporated the TIP into Tribal Law on December 7, 2016. The Tribe has

applied for, and fully supports, the approval of the TIP. This approval makes the TIP federally enforceable.

EPA worked and consulted with officials of the Tribe early in the process of developing these regulations. During the TAS eligibility process, the Tribe and EPA worked together to ensure that the appropriate information was submitted to EPA. The Tribe and EPA also worked together throughout the process of development and Tribal adoption of the TIP. The Tribe and EPA also entered into a criminal enforcement Memorandum of Agreement (MOA) during the TAS process, per 40 CFR 49.8.

This action does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action approves Tribal rules implementing a TIP over areas within the exterior boundaries of the Tribe's Reservation, and does not alter the relationship or the distribution of power and responsibilities established in the CAA.

Executive Order 12898 establishes Federal executive policy on environmental justice.¹⁷ Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA's objective in approving the TIP is to support the Tribe's efforts to protect the communities on the Reservation, where open burning operations and seasonal wildfires have been shown to contribute to exceedances of the particulate matter NAAQS. The impacts of this final rule are expected to be beneficial, rather than adverse, and its benefits are expected to accrue to communities on the Reservation.

¹⁷ 59 FR 7629 (February 16, 1994).

In reviewing TIP submissions, EPA's role is to approve an eligible tribe's submission, provided that it meets the criteria of the CAA. In this context, in the absence of a prior existing requirement for the tribe to use voluntary consensus standards (VCS), EPA has no authority to disapprove a TIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a TIP submission, to use VCS in place of a TIP provision that otherwise satisfies the requirements of the CAA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This action also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Indians, Indians—law, Indians—tribal government, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: February 4, 2022.

KC Becker,
Regional Administrator,
Region 8.

Part 49 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

1. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart K—Implementation Plans for Tribes—Region VIII

2. Add an undesignated center heading and §49.4200 to read as follows:

IMPLEMENTATION PLAN FOR THE NORTHERN CHEYENNE TRIBE

§49.4200 Identification of plan.

(a) *Purpose and scope.* This section contains the approved implementation plan for the Northern Cheyenne Tribe, submitted to EPA on September 25, 2017. The plan consists of programs and procedures that cover general and emergency authorities, ambient air quality standards, permitting requirements for open burning, general prohibitory rules, open burning limitations, enforcement authorities, and procedures for administrative appeals and judicial review in Tribal court.

(b) *Incorporation by reference.* (1) Material listed in paragraph (c) of this section was approved for incorporation by reference by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on the date of the approval, and notice of any change in the material will be published in the *Federal Register*.

(2) EPA Region 8 certifies that the rules/regulations provided by EPA in the TIP compilation at the addresses in paragraph (b)(3) of this section are an exact duplicate of the officially promulgated tribal rules/regulations which have been approved as part of the Tribal Implementation Plan.

(3) Copies of the materials incorporated by reference may be inspected at the Region 8 Office of EPA at 1595 Wynkoop Street, Denver, CO 80202 or call 303-312-6002; the U.S. Environmental Protection Agency, EPA Docket Center (EPA/DC), Air and Radiation Docket and Information Center, MC 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460 or call 202-566-

1742; and the National Archives and Records Administration. For information on the availability of this material at NARA, email fr.inspection@nara.gov, or go to: <http://www.archives.gov/federal-register/cfr/ibr-locations.html>. Copies of the Northern Cheyenne TIP regulations we have approved are also available at <http://www.epa.gov/region8/air/sip.html>.

(c) *EPA-approved regulations.*

Table 1 to Paragraph (c)

Tribal citation	Title/subject	Tribal effective date	EPA approval date	Explanations
Northern Cheyenne Tribe, Northern Cheyenne Clean Air Act Tribal Implementation Plan	Entirety	December 20, 2016	[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]	The Tribal effective date is based on the date the Bureau of Indian Affairs (BIA) Superintendent of the Northern Cheyenne Agency approved the Tribe's Ordinance No. DOI-008 (2017) adopting the Northern Cheyenne Clean Air Act.

[FR Doc. 2022-02724 Filed: 2/9/2022 8:45 am; Publication Date: 2/10/2022]